New Jersey Law Journal

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VOL. LVIII. NO. 6 — NEWARK, N. J., THURSDAY, APRIL 18, 1935 — Index Page 129 — COPY 10 CENTS

Digest of Recent Opinions

... and Wife — Separation Agreement—Termination.

Chancery

... vs. Aisosa

...11, 1935

...V. C. Bigelow

...mplt. Henry Marelli

...Deft. Mendelsohn & Mendelsohn

...for complainant.

...husband and wife entered into an agreement reciting they had found it impossible to live together in peace and harmony and had decided to separate, and the husband agreed to pay the wife $8 a week and she agreed not to interfere with his affairs or to pledge his credit. The husband sought to terminate the liability under the contract by offering to resume marital relations, the wife refused and brings this suit to enforce payment under the agreement. *Held*, that a contract between husband and wife, while void at law, will stand in equity if fair and fairly obtained.

Wood vs. Chetwood, 44 E. 64, 14 A. 21; that an agreement by the husband to make periodic payments for the support of the wife is not terminated by the husband's offer to resume cohabitation.

Evidence — Transaction with Decedent Mortgagee — Release Clauses

N. J. Chancery

Brown, Exr vs. Spannhalse

Decision Apr. 9, 1935

Egan, V. C.

For Complt, George M. Shipman Jr.

For Deft, Gross & Gross

The test laid down for ascertaining what is a "transaction with" the deceased within the intendment of Section 4 of the Evidence Act (2 Comp. St. 1910, p. 2216, et seq.) is to inquire whether, in case the witness testified falsely, the deceased, if living, could contradict it of his own knowledge. *Van Wagenen vs. Bonnet*, 74 E. 843; *Campbell vs. Akerman*, 83 E. 567.

Letters of a decedent mortgagee in response to demands of mortgagor for release of lands under covenant set forth in the mortgage, admitted in evidence. *Benevenute vs. Voorhees*, 7 *Misc. Rep.* 580, 146 *A.* 677.

Where the mortgagee's conduct of delay in giving releases of part of the mortgaged premises, under a covenant in the mortgage, unjustly prevents the mortgagor from exercising his expressed privilege under the covenant, his representative cannot with good grace complain of the defendant's laches in demanding such release. *Van Arsdale vs. Gorenflo*, 93 E. 486, 116 *A.* 869; *Malba Terrace Corp. vs. Portarysech*, 105 E. 253, 148 *A.* 206.

Workingmen's Compensation — Insanity Result of Injury

N. J. Sup. Ct.

... vs. Guenther

Before Justice Bodine

For Pros. Edward A. Markley, Patrick F. McDevitt

For Resp. David Roskein

On Cert. Judgment of Common Pleas reversed.

The respondent met with an accident in the course of his employment resulting in a trifling injury. Two days later he suffered a stroke of apoplexy, followed in a few months by a second. He is now insane. The Bureau found that there was no causal relationship between the hand injury and the insanity. This finding was reversed by the Court of Common Pleas. There was medical testimony, based on a hypothesis, that the insanity might have been related to the injury, as well as testimony that the man suffered

(Continued on page 2, col. 5)

Laws of 1935

(Continued from previous issue)

CHAPTER 84. (March 20, 1935) Regulates increase of capital stock of insurance companies and sets up requirements for converting mutual insurance company into stock company.

CHAPTER 85. (March 20, 1935) Capital requirements for domestic insurance companies increased and also for admission of foreign companies into New Jersey.

CHAPTER 86. (March 21, 1935) Vests all property of Hattie Hudson, deceased, formerly of Atlantic City, in Mabel O'Laughlin of Washington, D. C.

CHAPTER 87. (March 22, 1935) Provides for refund of monies erroneously paid for taxes under temporary 3.2% Beer Act.

CHAPTER 88. (March 22, 1935) Mortgage Deficiency Bill requires suit for deficiency to be brought within three months of confirmation of sale; allows bondsman to dispute deficiency by pleading fair market value. See article on Mortgagor's Liability for Deficiency by Saul Tischler. *N. J. L. J. Vol. LVIII—5 index* 121.

CHAPTER 89. (March 25, 1935) Repeals P. L. 1925 p. 313 and P. L. 1934 p. 406 exempting from transfer inheritance taxes to educational institutions receiving State aid; also exempting veterans' benefits received from the United States.

CHAPTER 90. (March 25, 1935) Incorporates in Section 1 of Transfer Act exemptions repealed in Chapter 89; also makes retroactive provisions of Transfer Inheritance Tax Act re-

(Continued on page 6, col. 1)

Recent Case Comment

By ALFRED C. CLAPP

Teets v. Hahn (E. & A.) overruled in the N. J. Supreme Court.

Hopper v. Public Service, etc., Transport (S. Ct.) 114 N. J. L. 468, N. J. L. A. March 21, '35, holds that a person who owns an automobile is not thereby competent to give an opinion as to its value. The trial court had admitted the testimony and was reversed by the Supreme Court for so doing. The case holds that *Teets v. Hahn* (E. & A.) 104 N. J. L. 357, 140 At. 427, (Kalisch, J.) could not have meant what it said to the contrary. We may note that *Teets v. Hahn* reversed the trial court for refusing to admit an owner's testimony of the value of his car and did not, as is stated in the *Hopper* case, affirm the trial court upon the admission of such testimony—a material distinction since the rulings of a trial judge as to the qualifications of a witness are conslusive on appeal if there is any legal evidence to support them: *Leonard v. Standard Aero Corp.* (E. & A.) 95 N. J. L. 235, 112 At. 252 However the error does not serve the Supreme Court, since the *Hopper* case presents the same situation the court thought was presented in the *Teets* case. We may note in addition, though it is again without moment, that the judges deciding this case are overruling their own previous opinions: *Ackerman v. Somerset Bus Co.* 12 N. J. Misc. 660, 174 At. 343; *Ross v. Neew*, 9 N. J. Misc. 412, 154 At. 198; and Anderson v. Electric Light Co., 7 N. J. Misc. 567, 146 At. 683. We pass to the principle itself that an owner of a car, and in fact of any personal property, may not testify as to its value—a rule which the court states, or at least gives one to think, "has stood the test of time and experience and is approved by all writ-

(Continued on page 4, col. 2)

Current Decisions

WORKINGMEN'S COMPENSATION INSURANCE—Extent of Coverage — Occupational Diseases.

N. J. Sup. Ct.

U. S. Radium Corp., (a body corporate) vs. Globe Indemnity Co., New Amsterdam Casualty Co., Aetna Life Insurance Co. and American Mutual Liability Insurance Co., bodies corporate.

For Pltf. Wall, Haight, Carey & Hartpence, Esqs.

For Deft. Globe Indemnity Co. and Aetna Life Ins. Co. Collins & Corbin, Esqs.

For Deft. New Amsterdam Casualty Co. Edwards, Smith & Dawson, Esqs.

For Deft. American Mutual Liability Insurance Co. McCarter & English, Esqs.

Judge Ackerson, S. C. C.

This action was submitted to the court, without a jury, upon an agreed state of facts. Plaintiff seeks to recover from four insurance companies, or from one or more of them, upon five liability policies, the sum of $10,000 heretofore paid to a former employee, Helen Tuck, and her husband, in settlement of an action for injury from radium poisoning alleged to have been sustained by said Helen Tuck while lawfully employed by plaintiff in its factory at Orange, New Jersey.

It appears from the stipulated facts that Helen Tuck was employed by plaintiff from May 20th, 1917 to August 24th, 1921, in mixing certain luminous materials with adhesives, (the mixture being commonly known as radium paint), and applying said mixture to numerals and designs on watch dials and other objects, and while so employed, and in the course thereof, she "became affected with an occupational disease resulting from her employment, wherein she ingested by mouth" the mixture known as "radium paint" by placing the brushes with which she applied said point "in her mouth for the purpose of pointing said brushes in order more readily to apply the paint, which practice extended throughout the period of her employment." Her employment terminated on August 24th, 1921, "but the presence of radium in her system was neither a direct nor indirect cause of or factor in the termination of such employment." There is attached to the stipulation of facts a copy of the complaint filed by Helen Tuck and her husband in their aforesaid action against the plaintiff herein, in which it is alleged that the radium paint so ingested has become impregnated in her body and "is of such an insidious character that it did not produce the consequential injury to the health and body of the plaintiff (Helen Tuck) until the month of June, 1928."

It is further stipulated that the settlement of the above mentioned action for $10,000, is, for the purpose of the present action, "to have the same force and effect as a judgment in favor of said Helen Tuck and her husband rendered in a trial of the said action against the plaintiff herein".

It also appears that the plaintiff herein carried insurance against liability to its employees with the four defendant insurance companies herein covering the period Helen Tuck worked for the plaintiff, as follows:—Globe Indemnity Company from November 4th, 1916 to November 4th, 1917; the New Amsterdam Casualty Company from November 4th, 1917 to November 4th, 1918, and by a renewal policy from November 4th, 1918 to November 4th, 1919; Aetna Life Insurance Company from November 4th, 1919 to August 20th, 1920, and the American Mutual Liability Insurance Company from August 20th, 1920 to September 1st, 1921.

The questions to be decided and the effect of such decisions are very care-

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Jurisdiction Over the Hudson River

By WILTON D. COLE*

A recent decision of the Appellate Division, First Department of the Supreme Court of New York, bears importantly on century-old issues arising out of the Treaty of 1834 between New York and New Jersey fixing the boundary line and jurisdiction of the two States in the Hudson River. In an opinion handed down on March 9th, 1935, by Mr. Justice Townley, in the case of *Clarke v. Ackerman*, that court gave further recognition to claims of New Jersey to sovereignty and jurisdiction over the Hudson River between the middle line of the river and the low water mark on the New Jersey shore.

Plaintiff brought the action to recover damages arising out of a collision between plaintiff's motorcycle and defendant's automobile upon the George Washington Bridge at a point several hundred feet westerly of the middle line of the river. The defendant, a non-resident of New York, was served with the summons, pursuant to the New York Vehicle and Traffic Law, by service upon the Secretary of State and, appearing specially, challenged the validity of the service upon the ground that the collision did not occur on a public highway *in the State of New York*, that the George Washington Bridge westerly of the middle of the river was not within the territorial limits of the state.

Thus was the issue raised of the effect of the provisions of the Treaty of 1834 giving to New York "exclusive jurisdiction of and over * * * all the waters of Hudson River lying west of Manhattan Island and to the south of the mouth of Spuyten Duyvil creek * * * to the low water mark on the westerly or New Jersey side thereof." The Special Term, relying on the foregoing provision of the Treaty, denied defendant's motion to vacate service of the summons and stated in its opinion that the cause of action arose upon "a public highway within the exclusive jurisdiction of the State." On appeal from this order to the Appellate Division, the Attorney-General of New York, the Attorney-General of New Jersey and The Port of New York Authority, a bi-state agency which owns and operates the George Washington Bridge, intervened as *amici curiae* and filed a brief in support of the position of the appellant that jurisdiction over the bridge where the collision occurred and the cause of action arose was exclusively in the State of New Jersey.

The issues involved trace back as far as the year 1664 when Charles II in that year granted to James, Duke of York, the colonies of New York and New Jersey. James, being thus vested with both governmental and proprietary rights on each side of the waters that separated the two colonies, granted to Berkeley and Carteret, New Jersey, describing it as "all that tract of land adjacent to New England and lying and being to the west of Long Island and Manhitas Island, and bounded on the east by the main sea and part of Hudson river * * *."

The point to be noted in this description is that New Jersey was described as bounded on the east by "Hudson's river." In 1674, after the Dutch restoration, these grants were renewed under the same description. In 1676 the quintipartite deed was made by the grantees of James and their co-tenants to Sir George Carteret of the easterly part of the premises granted by James to Berkeley and Carteret and in this instrument the land is described as "extending eastward and northward along the sea coast and the river called Hudson's river." Later came the war of the revolution from which the colonies of New York emerge as free and sovereign states.

From these facts arose a controversy between the two states as to the limits of their respective sovereignties and jurisdiction in the Hudson River, New Jersey claiming to the middle line of the river and New York to the low water mark on the New Jersey shore. In 1806 New Jersey appointed Commissioners who met with commissioners similarly appointed by New York and endeavored without success to agree upon a settlement of the controversy. In 1829 New Jersey filed a bill against New York in the Supreme Court of the United States, in which suit New York failed to appear and which was finally dismissed in 1836 after the successful conclusion by the two states in 1834 of a treaty for the settlement of the dispute. This treaty was negotiated by commissioners appointed by each of the states and, after ratification by each state (Laws of New York, 1834, p. 8; and Pamph. Laws, 1834, p. 118) was consented to by Act of Congress of June 28, 1834 (4 Stat. at L. 808, Chap. 126).

Article First of the treaty declared in explicit terms that the boundary line between the two states southerly from a point in the middle of the Hudson River approximately opposite the mouth of Spuyten Duyvil Creek "shall be the middle of the said river."

(Continued on page 3, col. 1)

United States Supreme Court

ABSTRACTS OF DECISIONS

BANKS: Stockholders Liability—Registration of Stock.

The actual owner of national bank stock is liable for an assessment made by the Comptroller of the Currency, although the stock has not been registered in his name.

No cause of action arises until the assessment is made by the Comptroller and, so far as concerns the need and amount, his findings are conclusive.

There can be no liability on account of assessments made after complete administration, final distribution of all the property and the extinguishment of the estate of deceased Stockholder.

Forest vs. Jack, Receiver of Nelphi National Bank 79 L. ed. Adv. Op. 376.

BANKS: Collection—Ownership of Proceeds—Insolvency of Collecting Bank.

At common law, in the absence of tokens of a contrary intention the agency of the collecting bank is brought to an end by the collection of the paper, and from then on the position of the bank is one of a debtor, with liberty, like debtors generally, to use proceeds as its own.

Claims for proceeds of check collected through a clearing house held not entitled to a preference on liquidation of collecting bank, notwithstanding provision of a state statute relating to bank collections that when a collecting bank shall fail or be closed for business by proper legal action after having received proceeds of a collection, but without payment, the assets of such collecting bank shall be impressed with a trust for the amount of such proceeds and the owner of the items collected shall be entitled to a preferred claim upon such assets, whether the funds can be traced or have been intermingled. This provision of the statute is inapplicable to national banks as inconsistent with the system of equal distribu-

(Continued on page 2, col. 4)

Conditional Sales of Fixtures

Material Injury to Freehold Under Section 7 of the Act

By MILTON B. CONFORD

The last three years have seen such diversity in judicial treatment of Section 7 of the *Uniform Conditional Sales Act* (P. L. 1919 p. 461, Comp. Stat. Supp. 182) from viewpoint both of rationale and result, that the situation begs for a forthright and dispositive adjudication by the Court of Errors.

The field of battle has centered about that portion of Section 7 which is as follows: "If the goods (conditionally sold) are so affixed to realty at the time of the conditional sale or subsequently as to become a part thereof and not to be severable wholly or in any portion *without material injury to the freehold*, the reservation of property as to any portion not so severable shall be void after the goods are so affixed as against any person who has not assented to the reservation," and more particularly about the phrase underscored.

What is severable without material injury to the freehold is patently a question of fact. A clear case of material injury would be presented were the conditional vendors of bricks built into a building to attempt their reclaimer as against a mortgagee or other lienor not consenting to the reservation of title. *Comments on Uniform Conditional Sales Act Uniform Laws' Annot.* Vol. 2-A. The great mass of cases which find their way into litigation however, involve sales of electric refrigerators, electric and gas ranges, heating plants, etc., involving approximately the same degree of affixation and ease or difficulty of severability, practically speaking. Such considerations are not, in New Jersey, criteria of "material injury." To the extent that any test can be said to enjoy general recognition, that status must be accorded to the "institutional" concept formulated by Vice Chancellor Backes in *Future Bldg. and Loan Ass'n v. Mazzucchi*, 107 N. J. E. 422. Speaking obiter, and while adhering to the general view that the effect of the Act was so far removed from the old law of fixtures that "material injury in detaching, not intention in attaching, is the test," the Vice Chancellor stated with respect to refrigerators and gas ranges sold conditionally into an apartment house, that material injury might connote injury to the building as an apartment house, i. e. to the "institution," and that, indeed, such fixtures were hardly removable without such injury.

This view was followed by Ingersoll, V. C. in *Helfend v. Satterthwait, Inc.* 109 N. J. E. 414 (Jan. 1932), affd. 113 N. J. E. 238 (E. & A. 1933), involving the petition of the conditional vendor of electric refrigerators for the exclusion thereof from a mortgage foreclosure sale. Intermediate these opinions came the exhaustive and well reasoned opinion of Vice Chancellor Berry in *Bank of America Nat. Ass'n v. La Reine Hotel Corp.* 108 N. J. E. 305, where Backes' institutional concept of injury was rejected as a relic of the antiquated law of fixtures, and appliances of the same general nature were held to be as a matter of fact, severable from buildings without material injury to the freehold, without regard to the possibility of injury to the "institution."

In October, 1932 the Court of Errors chose to follow Backes in its decision of the case of *Domestic Electric Co. v. Mezzalingo*, 109 N. J. L. 574. That was an action in replevin to remove from an apartment building certain electric refrigerators and coils and compressors appurtenant thereto, because of default under a conditional sales agreement. The installation of the apparatus had been in connection with the original construction of the building. The Court held that the refrigeration system was an integral unit and that "while the appellant might remove portions of the equipment without physical damage to the property considered merely as real property, it could not do so without wholly destroying the system considered as part of the building as an apartment house." And when, in November of the same year, Vice Chancellor Backes decided the case of *Reliable Bldg. and Loan Ass'n v. Purifoy*, 111 N. J. E. 575, it seemed that the law was definitely settled along lines, which, while debatable in principle, were, nevertheless consistent in the distinctions drawn. That case involved the severability, under Section 7, of a steam heating plant installed in a building some time after its original construction. It was held that the equipment might be removed from the effect of a mortgage foreclosure sale. The Court pointed out that removal of the chattels in this case still left the freehold in as entire a status as it existed prior to the installation, and that they were therefore "not indispensable to the structure as a dwelling—it may be heated as of old." This case was followed by Vice Chancellor Lewis in *Schutte v. Heating and Plumbing Finance Corp.* 116 N. J. E. 147 (1934) *affd.* 117 N. J. E. 19 also see *Arlotti v. Hauck*, N. J. L. J. (Apr. 4, 1935).

In 1933, however, the problem was cracked wide open again by the Court of Errors in *Russ Distributing Corp. v. Lichtman*, 111 N. J. L. 21. That was an action in replevin for electrical refrigeration equipment sold conditionally into an apartment house some time after the original construction thereof. The defendant was the purchaser under a foreclosure sale, the mortgage antedating the installation of the equipment. The membership of the Court divided eight to six, the majority following the institutional concept of Vice Chancellor Backes as applied in the *Satterthwait* case, *supra*, and holding that a removal of the chattels would constitute a material injury to the freehold. The majority chose to ignore the refinement of his theory of damage to the institution laid down by Vice Chancellor Backes in the *Purifoi* case, *supra*, leaving as the only tangible difference between the cases the fact that one involved a heating plant and the other a refrigeration assembly, surely a difference without a distinction.

With the decision of the *Russ Distributing Corp.* case the Court of Errors had apparently committed itself to the position that what constituted severability without material injury to the freehold was a matter of law for the court and that the question would be decided by the court purely by reference to the test of the indispensability of the chattels involved to the building in which they were installed, regardless of the nature of the building before the installation.

In 1932, however, the Court of Errors had held in *H. C. Vogel v. 295 Halsey Street*, 109 N. J. L. 83 (E. & A. 1932) that in an action of replevin for the recovery of an automatic sprinkler system brought for default under a conditional sales agreement, the issue of fact as to the material injury to the freehold was properly submitted to the jury in the form of an instruction to return a special verdict on the issue. This case was followed by the court in *Independent Automatic Sprinkler Corp. v. Morris*, 114 N. J. L. 93 (E. & A. 1934) where, in a case likewise involving automatic sprinkler equipment, the court held that the issue of material injury to the freehold was properly submitted to the jury. If ever a fact situation was presented unequivocally calling for an application of the institutional theory and requiring the conclusion under the theory of material injury, this was it. The sprinkler system had been installed in a new business and office building of a type which under the building code of the municipality required a sprinkler system in the building. The court nevertheless arbitrarily distinguished its ruling in the *Russ Distributing Corp.* case by declaring that that case presented a different situation, without indicating in what respect the suitability of the building in the present case for its functional purposes was less affected than was the apartment house in the *Russ Distributing Corp.* case by the removal therefrom of electric refrigerators, and held, as observed above, that it could not be said as a matter of law that the removal of the sprinkler system would involve material injury to the freehold. This decision has been adversely criticized in 48 *Harv. L. Rev.* 857 (March, 1935) where it was observed that "the vagueness of the New Jersey test gives the conditional vendors of many articles no certainty as to whether their security is valid." In *Pimone vs. Rubens, Inc.* (Chancery, Supp. V. C. N. J. L. N. (Mar. 14, 1935), the court cited the *Independent Automatic* case as authority for holding that restaurant equipment conditionally sold and installed into a new building functionally designed for restaurant purposes could be removed therefrom without material injury to the freehold.

It is thus to be observed that the very essence of the institutional theory as originally defined and laid down by Vice Chancellor Backes in the *Future Building and Loan Association* and the *Reliable Building and Loan Association* cases has been completely distorted by the Court of Errors.

The following conclusions are reluctantly submitted as to the present status of the law on this subject:

1. Electric refrigerators—These appliances are, as a matter of law, not severable without material injury to the freehold and this without regard to whether installation takes place at the time of the construction of the building or subsequently. Conditional vendors of such articles are consequently relegated to the financial responsibility of the purchaser for their security.

2. Heating equipment—Under the *Reliable Building and Loan Association* case, severability apparently depends upon whether the equipment was installed at the time of construction of the building or otherwise, subject to whatever qualification of this result may be considered to attach to the ignoring of this distinction in the case of electric refrigerators by the Court of Errors in the *Russ Distributing Corp.* case. It cannot be safely vouchsafed whether in this situation severability without material injury is a matter of law for the court or of fact for the jury.

3. Automatic sprinkler systems—It is debatable that in this situation severability is a matter of fact for decision by jury where the controversy arises in an action at law. In Chancery, the question of fact is, of course, for the Vice Chancellor, the tendency in Chancery being to hold that appliances affixed merely by bolts and screws are so severable.

4. All other fixtures—With respect to all fixtures other than those enumerated above, the field is open for speculation and conditional vendors can have no assurance as to the validity of their lien, the tendency in Chancery being to protect such vendors, at least against owners, and incumbrances antedating the installation. (This latter consideration has no strict materiality in view of the express language of the Act protecting *all* persons not expressly assenting to the reservation of title where severability is impossible without material injury, but is frequently adverted to in decisions favoring vendors as against prior incumbrancers.)

United States Supreme Court

ABSTRACTS OF DECISIONS

(Continued from page 1)

tion established by the Federal law. *Jennings vs. U. S. Fidelity & Guaranty Co., 79 L. ed. Adv. Op. 355.* Cf. *Pruden & Co. vs. Bank*, 115 E. 305, 179 A. 866, this decision is commented upon in 83 U. of S. Law Review, p. 791 (April, 1935), and 23 Georgetown Law Journal, p. 534 (March, 1935).

RECEIVERSHIP: Stockholders Suit—Jurisdiction of District Court — Property in Hands of State Officer.

A stockholders bill alleging diversity of citizenship, the requisite jurisdictional amount and insolvency and praying for a receiver and liquidation of the assets of the defendant company established jurisdiction of a district court as a Federal Court of equity.

The discretion of a Federal District Court which has jurisdiction for the appointment of receivers for an insolvent building and loan association should be exercised, upon application of the proper state officers, to relinquish jurisdiction in favor of the officers designated by the state statute for the administration of the assets of such corporation, where the procedure provided by the statute is adequate and complete and accomplishes the same end in substantially the same manner as could be reached in receivership proceedings in the Federal Court.

Gordon vs. Ouinsky, etc., 79 L. ed. Adv. Op. 300.

Digest Recent Opinions

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from arteriosclerosis. The Court found that the proofs were not consistent with the theory that the apoplexy and insanity were caused by arteriosclerosis and reversed the finding of the Common Pleas Court.

Executions—Garnishment—Review.
N. J. Sup. Ct.
McDermott vs. Henry.
Before Justice Parker.
Appeal from Mercer Common Pleas.
For Applt. Charles Quinn.
For Resp. William Reich.

Proceedings taken in the Common Pleas under the Supplement of 1915, page 122, to the Execution act, by way of garnishing a debt due to the defendant in execution, are reviewable by certiorari and not by appeal.

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...isdiction Over ...e Hudson River

(Continued from page 1)

But the framers of the treaty saw fit to qualify the obvious implications of this Article First. The port of New York was a principal center of trade. Division of jurisdiction with possible confliction between the laws and regulations pertaining to commerce upon port waters would affect adversely the commercial welfare and growth of the port. The interests of both states demanded unity of control over such waters. Considering, therefore, the necessities of the case, the exigencies of commerce and the interests of the port of New York in particular, in whose prosperity New Jersey had in a large degree a common interest with New York, the framers of the treaty conceded to New York single and exclusive jurisdiction over the waters of the Hudson River and New York Bay. Article Third of the treaty provided:

"The State of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York, and of and over all the waters of Hudson river lying west of Manhattan island and to the south of the mouth of Spuyten Duyvil Creek and of and over the lands covered by the said waters to the low water mark on the westerly or New Jersey side thereof."

With the jurisdictional issues thus raised by the above provisions of Article First and Article Third, the treaty-makers apparently were not content. Intrepidly they proceeded to qualify further the "exclusive jurisdiction" given New York by three reservations:

"1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

"2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks and improvements made, and to be made, on the shore of the said state, and of and over all vessels aground on said shore, or fastened to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist or which may hereafter be passed.

"3. The state of New Jersey shall have the exclusive right of regulating the fisheries on the westerly side of the middle of said waters, provided that the navigation be not obstructed or hindered."

Out of this Treaty of 1834 to end the boundary controversy, further controversy arose. During the hundred years since the making of the treaty certain of the issues arising therefrom may now be said to be settled by the determination of the courts of the two States and of the United States; others remain to be determined. An obvious question is the effect, if any, of the treaty upon the jurisdiction of the United States over the river and bay as navigable waters. Although it was contended that the effect of the compact and the Act of Congress consenting to such compact was to abdicate certain rights in favor of the Federal Government, it is clear that the compact had no such effect. *Hamburg-American steamship Company v. Grube*, 196 U. S. 407, (1904). The compact does not add to nor detract from the paramount power of Congress to regulate commerce and navigation upon the navigable waters of the river and bay. On the other hand, where Congress does not assume to exercise that power the states are free to enact reasonable rules and regulations with respect to commerce and navigation upon such waters, except as restricted by the Constitution. *Cummings v. Chicago*, 188 U. S. 410, (1902).

The principal questions arising out of the treaty concern the nature of the "exclusive jurisdiction" granted to New York: whether under Article First of the treaty, fixing the boundary line between the States as the middle line of the river, New Jersey retained merely a naked right of property or the fundamental rights of sovereignty; whether the exclusive jurisdiction given to New York under Article Third was a jurisdiction over civil and criminal matters for all purposes or was a restricted police jurisdiction with respect to the regulation over crafts and commerce upon the waters; whether jurisdiction over "wharves, docks and improvements" retained by New Jersey under the second exception to Article Third applied to such improvements beyond the low water mark on the New Jersey shore and to an improvement such as a bridge between the shores of both States, an improvement which could scarcely have been contemplated by the framers of the treaty.

During the hundred years since the making of the treaty judicial construction has established clearly certain general propositions: that the dominant fact of the treaty was the establishment of the boundary line in Article First of the treaty at the middle line of the river and bay; that New Jersey retained not merely a naked right of property, but the basic and underlying right of sovereignty, in the lands under water westerly of the middle line of the river and bay; that the exclusive jurisdiction given to New York under Article Third of the treaty was only an extraterritorial police jurisdiction for the promotion of commerce and navigation on said waters.

New Jersey courts have considered the treaty in four cases: *State v. Babcock*, 30 N. J. L. 29, (1862); *Central Railroad Company of New Jersey v. Jersey City*, 70 N. J. L. 81, aff'md 72 N. J. L. 31, aff'md 200 U. S. 473, (1903); *Cook v. Weigley*, 72 N. J. E. 221, (1906); *Tennant v. State Board*, 95 N. J. L. 405.

State v. Babcock, supra, the earliest case in which the treaty was considered, involved an indictment for obstructing the free navigation of the Hudson River by placing vessels on the New Jersey shore above and below the low water mark. Although the case was sent down for a new trial on the ground that it did not appear whether the vessels were obstructions to navigation, the opinion of the court, delivered by Judge Elmer, stated clearly that the extraterritorial jurisdiction granted to New York under the treaty, included the "exclusive control over the police on the surrounding waters and full power to establish such quarantine regulations as should be found necessary." (Page 33). This opinion was later declared to have considerable weight in the construction of the treaty in view of the fact that Judge Elmer was one of the Commissioners who negotiated the Treaty.

Central Railroad Company of New Jersey v. Jersey City, supra, decided in 1903, established the right of Jersey City to tax lands under water between the middle line of the river and the New Jersey shore upon the ground that under the Treaty of 1834 the sovereignty of New Jersey was co-extensive with the territorial boundary limits established by Article First of the Treaty. The lower court, in its opinion by Judge Garrison, carefully considered the question whether sovereignty was disposed of under Article First or Article Third of the Treaty and in support of its conclusion that sovereignty was disposed of under Article First referred to two earlier decisions of the New York courts: *People v. Central Railroad Company of New Jersey*, 42 N. Y. 283, (1870); *Ferguson v. Ross*, 126 N. Y. 450, (1891). On appeal to the United States Supreme Court that Court, in its opinion by Justice Holmes, in confirming the lower court decisions, stated:

"It appears to us plain on the face of the agreement that the dominant fact is the establishment of the boundary line. * * * The provision as to exclusive right of property in the compact between states is to be taken primarily to refer to ultimate sovereign rights, in pursuance of the settlement of the territorial limits, which was declared to be one purpose of the agreement, and is not to be confined to the assertion and recognition of a private claim." (209 U. S. 473, 478).

Cook v. Weigley, supra, affirmed that jurisdiction over a foreclosure proceeding brought with respect to an island in waters over which New York under Article Third of the Treaty had extraterritorial jurisdiction, resided in the New Jersey courts and was not conferred upon the New York courts by that Article.

Tennant v. State Board, supra, was another tax case in which the right of Jersey City to tax vessels anchored below low water mark but westerly of the middle line of the river was upheld.

It is an interesting observation, from the history of this question, that the New York courts have defined more strictly than the New Jersey courts the nature of the extraterritorial police jurisdiction given to New York under Article Third of the Treaty. The leading case on the question of the extraterritorial jurisdiction given to New York under the Treaty and the case in which this question has received its most extensive discussion is the early case of *People v. Central Railroad Company of New Jersey*, 42 N. Y. 283, (1870). In that case the Court of Appeals held that certain docks, wharves, piers, railroad tracks and ferry slips, erected under express authorization of the State of New Jersey and extending from the New Jersey shore line one mile and one hundred and five feet into the bay and river south of Jersey City, but westerly of the middle line of the river, were structures within the exclusive jurisdiction of the State of New Jersey and that the New York courts had no jurisdiction to abate these structures as nuisances and cause their removal. The court pointed out that the primary purpose of the compact was the establishment of the territorial boundary lines and limits of sovereignty of the two states in Article First (page 292); that the extraterritorial jurisdiction conferred upon New York did not constitute full and complete territorial and sovereign rights and that Article Third "could not have been intended, whatever may be its legal effect or construction, to restore to this State rights so long and so earnestly and persistently claimed by New Jersey, and thus so formally renounced by this State in the First Article of said Treaty" (page 297-8); and that the extraterritorial jurisdiction intended to be given to New York "was to be a police jurisdiction of and over all vessels, ships, boats or craft of every kind that would or might float upon the surface of said waters, and over all the elements and agents or instruments of commerce, while the same were afloat in or upon the waters of said bay and river for quarantine and health purposes, and

(Continued on page 7, col. 1)

Occupational Disease

By MAX KUMMEL, M. D.

An attorney, upon being retained in an accident case, pictures in his mind's eye a chain of events surrounding the accident. The client is struck down. He is rushed to the hospital. First aid is administered. Stitches are inserted or a cast applied. He is temporarily incapacitated for a period of time and subsequently returns to work, with or without, further sequelae. Or, he may be permanently injured. An altogether different picture is presented by the client suffering from an occupational disease. In most cases not only is the attorney in a fog but, frequently even the attending physician treats symptoms because unable to arrive at a definite diagnosis without further aid and additional information. Rarely is the client in possession of sufficient data upon which the complaint can be drawn.

Occupational diseases are defined as injuries and disturbances of health contracted in industrial pursuits and other vocations in life as a result of exposure to toxic agents, infectious organisms, mechanical irritants or other conditions inimical to life. From the legal standpoint occupational diseases may be divided into (1) compensable diseases consisting of these 10 conditions scheduled under the New Jersey Compensation Act. (2) Non-compensable diseases consisting of all other occupational ailments, which do not come within the scope of the act. Their number is so great, and their incidence so universal that it would be impossible to enumerate them. Furthermore, as new chemical processes arise, new diseases develop. We learn of them by bitter experience and at the expense of the stricken worker. Diseases growing out of exposure to industrial dust hazards are probably the most frequently encountered by the attorney, for the reason that about 15% of all workers in industry are exposed to them. Approximately 200 different occupations give rise to dusts from minerals, vegetable and animal matter in the manufacturing process.

To present a prima facie case for a compensable occupational disease, all that is required, is, the establishment of a definite exposure, an unmistaken diagnosis, written notice to the employer, or, actual knowledge on his part of the existence of the disease, and, disability, if any, resulting from the disease. In non-compensable diseases, the burden of proof rests entirely upon the plaintiff. The mere establishment of the foregoing facts is insufficient to obtain a verdict. Negligence on the part of the employer must be proved. He must have violated a duty owing by him to his employee. He must use reasonable diligence to protect him against unnecessary risks. It is necessary to prove that the plaintiff was exposed to the hazard. That as a result of such exposure, he contracted the disease and, at present suffers from it. The plaintiff must prove further that the condition could have been prevented by the use of approved safety devices, and that the employer failed in this, thus constituting the proximate cause of the disease.

The medical aspect of these cases is usually complicated and requires most careful consideration. The average plaintiff, while giving minutest details respecting his physical ailment, throws little or no light on the offending processes responsible for his condition. Another claimant may have been exposed to more than one vapor or dust, leaving it to his physician to determine the deleterious agent. In order to arrive at a definite diagnosis, strict co-operation between the attorney and physician is essential. By his investigations and interrogatories the former can ascertain what injurious substances or processes the plaintiff was exposed to, and, to thereupon report his findings to the physician. The latter obtains a history, makes a physical examination, checks up on the x-rays, obtains the bio-chemical reports and correlates them into one composite picture which usually discloses the true state of affairs.

Oftimes, the attending physician or medical expert meets with almost insurmountable difficulties. A man with a pulmonary tuberculosis may attribute his condition to lengthy exposure to dust. Further investigation discloses that it was coal dust. This has been accepted to be the cause of anthracosis but also to be a preventative of tuberculosis. A careful physical and chemical analysis of the dust will probably explain the apparent contradiction. We are all more or less familiar with the history of the afflictions of the radium dial painters. The true character of their radium necrosis was not discovered until long after the exposure ceased. Similarly, new processes for the manufacture of dyes are being inaugurated in our chemical industries, the products and by-products of which may be extremely poisonous. Not only the employee, but even the employer, may become the victim of his own creation because of the uncertainty of experimental chemistry.

Change of Schedule in IRVINGTON DISTRICT COURT

Cases which were adjourned to the Commercial Day, Thursday, April 18th, will go over until April 25th at 9:30 A. M. This is in deference to the Jewish Holiday on April 18th and the Legal Holiday on April 19th.

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The New Jersey Law Journal opposes the publication of letters of personal commendation or criticism of members of the Bench or other personnel of the Courts, but welcomes at all times information and suggestions concerning the functioning of the Courts.

THURSDAY, APRIL 11, 1935

Lawyers' Bill Defeated

On Monday, April 8th, the Senate defeated the Assembly Committee Substitute Bill making it a misdemeanor for laymen to practice law. No concerted opposition was manifest until after the Bill had passed the Assembly. It then became apparent to real estate, banking and other interests that a substantial portion of their business was imperiled.

The Bill itself presented sufficient vulnerability to give the opposition arguments which appealed to the general public. The Press in general allied itself promptly and vigorously against the Bill. Newspapers have little patience with a profession which furnishes no advertising.

The debate on the floor of the Senate was heated and bitter. Senator Powell's statement that the proposed Bill would lower the legal profession to the level of the medical profession had indeed a humorous implication but the humor was unintentional. The defeat of the Bill was decisive and it is highly improbable that any effort will be made to revive it during the present legislature.

It is true that the Bill failed to define the practice of law, for the sufficient reason that it is not subject to definition. Acts regulating the practices of other professions have presented no unusual difficulties of interpretation where Courts have been called upon to determine a violation.

The accusations of ambiguity which were made against the Bill were superficial. It was opposed and defeated because it threatened the income of individuals who are using the corporate device for the solicitation and practices of legal business; because it threatened with prosecution, corporations which practice law through the medium of a salaried employee; because, in a word, it raised a conflict of interest between organized business and the unorganized legal profession. The outcome of such a conflict was a foregone conclusion.

Lawyers, as a class, are perhaps more difficult to arouse than any other. Entrusted with the enforcement of the rights of others, they consistently neglect their own. A controversy involving the practice of their profession is especially distasteful; but the present increasing encroachment upon the legal domain cannot be longer tolerated. If the Bar Associations would take concerted action, if they would strike at illegal practices with the militant indignation which is so fully justified, much could be accomplished without protective legislation. Let that be done which, in decency, in self-respect, in fairness to Public and Bar alike, ought to be done.

Recent Case Comment

(Continued from page 1)

ers on the subject of evidence and the qualifications of witnesses."

The following text writers hold that an owner may give his opinion on the value of personal property: 1 *Wigemore on Evidence* (2nd ed.) Sec. 716; 3 *Chamberlayne Evidence*, Sec. 2130-2130; *Jones Evidence* (2nd ed.) Sec. 1266; 1 *Greenleaf Evidence* (16th ed.) Sec. 440 (p.); *Lawson Expert and Opinion Evidence* (2nd ed.) p. 481; Byrne Federal Evidence, p. 564; 22 C. J. 581. No text to the contrary has been found. The cases that an owner is competent to testify as to the value of his chattels are here listed (one from each jurisdiction) as they appear nowhere to be fully collected. They testify as to the universality of the doctrine. *Bartelt v. Fawcett*, 21 F. (2nd) 208 (furniture); *Mo. Pac. R. Co. v. Fowler* (Ark.) 34 SW. (2d) 1071 (personalty); *Cook v. Purman* (Ariz.) 86 Pac. 6 (extensive library and household furniture); *Berg v. Trainer* (Cal.) 202 Pac. 495 (auto); *Stavro v. Famularo* (Colo.) 253 Pac. 1060 semble (furniture); *Atlantic R. Co. v. Sandlin* (Fla.) 78 So. 667 (harness); *Sandersville v. McDaniel* (Ga.) 138 SE. 584 (auto); *Garrett v. Neitz* (Ida.) 285 Pac. 472 (auto); *Smemaker v. Rose*, 62 Ill. App. 118 (household furnishings); *Gay v. Shaddle* (Iowa) 176 NW. 935 (auto); *Lawson v. So. Fire Ins. Co.* (Kan.) 21 Pac. (2d) 387 (airplane hanger); *Davis v. Rhodes* (Ky.) 266 SW. 1091 (household goods); *Keer v. Great N. & P. Co.* (Mo.) 140 At. 618 (machinery and miscellaneous property); *Bailey v. Ford* (Md.) 135 At. 855 (auto); *Shea v. Hudson* (Mass.) 42 NE. 114 (horse and buggy); *Kavanagh v. St. Paul Fire & Marine Ins. Co.* (Mich.) 221 NW. 301 (auto); *Patterson v. Chicago R. Co.* (Minn.) 103 NW. 621 (auto); *Whitfield v. Whitfield*, 40 Miss. 352; *Kliad v. Valley Co. Bank* (Mont.) 222 Pac. 430 (cattle—overruling expressly *Koy v. Clark*, 215 Pac. 232—an auto case); *Hellims v. Randol* (Mo. App.) 40 SW. (2d) 500 (auto); *Folkes v. Union Pac. R. R. Co.* (Neb.) 230 NW. 831 (auto truck); *Haas v. Met. St. Ry. Co.* 90 N. Y. S. 888 (wagon); *George v. Odenthal* (No. Dak.) 225 NW. 323 (movable buildings); *Hartford Fire Ins. Co. v. Smith* (Okla.) 284 Pac. 624 (auto); *Detroit, etc., Co. v. Bogeley* (Ohio) 153 NE. 86 (auto); *Barber v. Motor Inv. Co.* (Oregon) 208 Pac. 216 (furniture); *McGill v. Roseland*, 3 Pa. St. 452 (jewelry and chattels); *Aldrich v. So. Ky. Co.* (So. Car.) 79 SE. 316 semble (seed); *St. Mary's Oil Engine Co. v. Allen-Morrow Co.* (Tex.) 20 SW. (2d) 260 (engine); *Wicklund v. Allraun* (Wash.) 211 Pac. 760 (auto); *Farley v. Spring Garden Ins. Co.* (Wis.) 107 NW. 478 (personalty) Contra Molton v. Smith (R. I.) 60 At. 681 (not laying down a rule); Sykes v. Wood (Ala.) 91 So. 320. Of the above 30 cases from as many jurisdictions supporting the rule that an owner of a chattel is competent to testify as to its value, 13 are cases of autos.

On the reason of the rule, there is not much to be said that is not apparent. An owner of a chattel is assumed to have some knowledge of its worth. Sometimes the testimony may not be very satisfactory; in fact it may be trifling in weight; but it is competent. Where there is an attempt of an owner to abuse his privilege to so testify, we must rely on the sense of the jury to apply the proper corrective. Kalisch, J., recognized this in Teets v. Hahn where he said: "The opinion of the plaintiff as to the value of the car before it was smashed in the collision, was competent testimony and the extent of its probative value was for the consideration of the jury." The rule makes part of the modern development of the law of evidence that has broken down the doors disqualifying witnesses; feeling it better that the testimony go in and that it stand or fall by its own weight than that an artificial rule exclude it on the ground that some of the testimony that may be offered by some such person is a detriment to justice. Many owners who are not experts on the values of cars in general have a good knowledge of the value of their own car.

The authorities in other jurisdictions draw no distinction between the value of a car before and after the collision. An owner is permitted to testify as to both values. Parenthetically an exception may be taken to the reasoning approved in *Teets v. Hahn* to the effect that there is no market value for damaged chattels and that the value of such chattels cannot be the subject of expert testimony. It seems an expert should be permitted as well as an owner to testify to the value of damaged chattels.

This almost universal rule that an owner may testify as to the value of his chattels does not conflict with anything that Beaseley had before him when he uttered the broad dictum that is the foundation of the Hopper case, that—"none but experts on the given subject can, in any course of law, express their estimate of the value of anything real or personal." Beaseley's case and the cases citing it are every one, cases of real estate (not excepting the "shade tree" cases). The word "personal" contained in his dictum was entirely gratuitous. The law as to testifying concerning the value of real estate grew up more strictly in this state than in most. See 1 Wigemore Section 713 et seq.; but that law is settled. Even so the qualifications to enable a witness to testify as to realty are everywhere stricter than as to personalty. (As to whether an owner of real estate may testify as to its value, see *Walsh v. Board of Education (E. & A.)* 73 N. J. L. 643, 64 At. 1088 holding that some one owned the realty in question until a year of the trial, was disqualified to testify as to its value). Moreover be it said that Beaseley was not dealing with the question as to whether an owner may testify. No one doubts that when persons other than owners testify as to value they must be experts. With the limitation of *Teets v. Hahn*, Beaseley's dictum may well be adopted.

Kalisch, J., in *Teets v. Hahn supra*, was following a path well-trodden by the common law. His decision may have surprised the bar. Competent New Jersey lawyers had for years relied solely on expert testimony for the value of chattels, as they will continue to do. But no New Jersey court had studied the question carefully and until a court does so, all common law questions are open. The holding of *Teets v. Hahn* that an owner of an automobile may testify as to its value can be fully supported.

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Bar Association Notes

Conference of County Bar Associations

A meeting of the Conference of County Bar Associations of New Jersey was held at the Progress Club, 37 Fulton Street, Newark, New Jersey, on Saturday afternoon, April 6th, 1935. Delegates were present from the counties of Bergen, Essex, Hudson, Mercer, Passaic, Somerset and Sussex. President William J. Connor, of Trenton, presided.

Forster W. Freeman, Jr., Esq., of Paterson, was appointed Chairman of a committee to appear before the State Labor Commissioner in connection with the revision of the rules in compensation cases. Milton M. Unger, Esq., of Newark, and Louis A. Mounier, Jr., Esq., of Hackensack, will act with him on this committee.

A considerable discussion took place concerning tax appeal procedure in this State and the difficulty of securing the introduction of proper evidence before the several Tax Appeal Boards in the State. Alex Selcow, Esq., of Bayonne, will act as Chairman of a committee to study this question and recommend changes. George H. Rosenstein, Esq., of Newark, and M. Metz Cohen, of Paterson, will act upon this committee.

Several delegates present spoke on the subject of the great waste of money in connection with the excessive legal advertising now required by Statute in this State which results in a great loss to the general public and which benefits no one. A resolution was adopted directing the President to appoint a committee to study the advisability of reducing the legal requirement in connection with legal advertising, which committee is to report back as to the manner in which this can be accomplished. The President appointed John Gough, Esq., of Jersey City, as Chairman of this Committee, to be assisted by Charles H. Stewart, Esq., and Herbert Kuvin, Esq., both of Newark, William Seldon, Esq., of Paterson, and himself.

The Conference again went on record endorsing and urging the passage of the legislation now pending to confine the practice of law to duly admitted members of the Bar.

Camden County

The Camden County Bar Association held its regular monthly meeting on March 19, at which forty members were present. The President addressed the meeting on the nature and objects of his administration and the First Vice President upon the current program of the American Bar Association. The next regular meeting will be held on Thursday, April 18, 1935 at 3:30 p. m. in Room 420, New County Building.

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"The Restatement of the Conflict of Laws" by Ernest G. Lorenzen and Raymond J. Heilman—University of Pennsylvania, March 1935.

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"Force and the State: A Comparison of 'Political and Economic Compulsion'" by Robert L. Hale—Columbia Law Review, February 1935.

"Government Corporations: A Proposal" by Oliver Peter Field—Harvard Law Review, March 1935.

"Constitutional Problems Arising from Service of Process upon Foreign Corporations" by Maurice H. Culp — Minnesota Law Review, March 1935.

"Labor and the New Jersey Constitution" by Milton Konvitz—Mercer Beasley Law Review, January 1935.

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"The Revenue Act of 1934" by John P. Ohl and George Grayson Tyler—University of Pennsylvania Law Review, March 1935.

TRUSTS

"Problems of Trust Administration in New Jersey" by Harold S. [illegible] and Harry Brandchaft—Mercer Beasley Law Review, January [illegible]

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ent Decisions

(Continued from page 1)

nd exactly set forth in the stip- of facts as follows:

here are but two legal ques- to be litigated and determined this action. There questions are: IRST: Did the defendant com- ies, or any of them, by the terms their respective policies, insure plaintiff against liaiblity to Phillips (now Helen Tuck) Valter M. Tuck, her husband, ber of them, on their claims they made against the plain- rein, and sought to enforce by against it brought in the New ersey Supreme Court, and removed y this plaintiff to the United States District Court for the District of New Jersey, which claims were com- romised and settled before trial by he payment by plaintiff herein of he sum of $10,000 to said Helen Tuck and her husband, Walter M. Tuck. The defendants do not in his action contest the right to make said settlement. * * *.

SECOND: If there is coverage nder the said policies, what propor- the said amount of $10,000.00 legally be borne by each com-

other questions are eliminated his litigation.

the before stated questions e submitted to the Court in his action is pending for de- upon the facts herein stipu- and judgment or judgments be entered in accordance with answers which said Court may to the said questions; any and arties reserving the right to ap- from any such judgment or ngments."

ere can be no doubt that all of olicies involved herein cover two or types of liability which are sed in two separate paragraphs ally referred to as insuring nents.

defendants insist that the loss ged by the plaintiff in its settle- with Helen Tuck and her hus- is not covered by any of the s because they cover only such as are sustained by the assured iff) on account of personal in- to its employees caused by *acci-* (whether arising under the en's Compensation Act, P. L. hap. 95, p. 134; 2 Cum. Supp. to Stat. 3868, or at common law), that radium poisoning is an oc- nal disease and not an injury dent.

plaintiff on the other hand con- that in these contracts of insur- he defendants undertook to pro- e assured (plaintiff) against loss l damages recovered against it ployees for all personal injuries ed in their employment from ever cause arising. That two of personal injuries are covered the policies. First, those contem- plated in the Workmen's Compensa- tion Act, i. e. loss caused by accidents, and second, all injuries to employees for which damages at common law, as distinguished from compensation un- der said act, are recoverable, whether arising from accidents or otherwise, and that theretofore, injury by radium poisoning is covered by the policies.

It is stated in the stipulation of facts that radium poisoning is an occupational disease, and it is conceded that as such, injury therefrom was not compensable at the time these policies were in force under either section 1 or section 2 of the Workmen's Compensation Act as it then stood, because said act only provided for compensation or damages to an employee for personal injury by *accident* arising out of and in the course of his employment, and it is well settled that an occupational disease is not the result of an *accident*, at least within the meaning of said act as it then stood. Liondale Bleach Works vs. Riker, 85 N. J. L. 426; Smith vs. International High Speed Co., 98 Id. 574. Injury by radium poisoning was not made compensable under the act until the amendment of 1926. (P. L. 1926, chap. 31, p. 62).

It follows, therefore, that if these policies only cover liability for personal injuries falling under the provisions of the Workmen's Compensation Act, there could be no recovery against these defendants.

But even if the coverage of these policies is not so limited, nevertheless, a careful reading of their provisions will inevitably lead to the conclusion that the coverage afforded thereby does not extend beyond liability for personal injuries sustained by *accidents* and that injuries resulting from any other cause are not covered thereby.

It is conceded that the policies cover only bodily or personal injuries sustained by employees of the assured, and that the first insuring agreement deals exclusively with claims arising, at least under section 2 of the Workmen's Compensation Act, if not, as claimed by plaintiff, under section 1 thereof as well.

The second insuring agreement appearing in the Globe Indemnity Company's policy reads, (Italics in all quotations ours):

"To indemnify the assured against loss from the liability imposed by law upon the assured for damages on account of personal injuries, * * * *accidentally* suffered, * * * during the policy period * * *, by any employee or employees of the assured who shall not have elected to accept the provisions of the said Act, * * *".

Paragraph VI of the policy requires the insurer:

"To pay, on account of personal injuries to which Section 2 of the said act" (Workmen's Compensation Act) "applies, for medical and hospital services and medicines, subject to paragraph 14 and 14a of section 2 of said Act, but on account of all other personal injuries *to which this policy applies* to pay only for such immediate surgical relief as is imperative at the time of the *accident*."

Aside from certain general provisions which are common to all the policies and which will be hereinafter noticed, it will be observed that the coverage afforded by this policy is limited to "personal injuries * * * *accidentally* suffered," which means arising out of *accidents*, as indicated by the provision last quoted, which limits the policy to "personal injuries *to which this policy applies*", and not to all personal injuries, and which indicates to what injuries the policy does not apply by further stating that the insurer will not pay for general medical and hospital services and medicines, but only for such *immediate* surgical relief "as is imperative at the time of the *accident*."

The second insuring agreement is identical in the policies of the Aetna Life Insurance Company and The American Mutual Liability Insurance Company, and, so far as pertinent, reads:

"To indemnify this employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries" (personal injuries) "to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada."

The coverage intended by this paragraph is controlled by paragraph VII of these policies which reads:

"This agreement shall apply only to such injuries so sustained by reason of *accidents* occurring during the Policy Period limited and defined as such in Item 2 of said Declarations."

The Item 2 of the Declarations thus referred to merely fixes the period during which the policy shall remain in force,—from a specific date to a specific date.

To avoid the effect of this positive limitation of the coverage of these policies, the plaintiff contends that the only purpose and object of this paragraph is "to point to the provisions of the policies defining the policy period", and that to hold otherwise would be permitting this independent paragraph to completely over-ride a specific contract to indemnify plaintiff against all common law liability to its employees contained in the second insuring agreement above quoted.

There are many difficulties in the way of this contention. In the first place there are other provisions in the policies, common to all under consideration, and presently to be mentioned, which control the unlimited common law liability contended for by the plaintiff. In the second place Item 2 of the Declarations sufficiently specifies the policy period. The purpose of the paragraph is not ambiguous, but is perfectly plain. It is intended to define the coverage of the policy as including, not all injuries, but only such injuries as arise from an *accident* occuring during the policy period, so that a finger may be put upon an event, (accident) *occuring within the policy period to which* the resultant injuries may be traced.

That paragraph VII above quoted is controlling in limiting the coverage afforded by these particular policies to injuries by accidents is emphasized by the conclusions reached in the case of Maxon vs. N. J. Mfgrs. Casualty Insurance Company, 10 Misc. 1164; 162 Atl. 427; and the case of Belleville Enameling and Stamping Company vs. U. S. Casualty Co., 266 Ill. App. 586 (1932): * * * * * * * * * (Certiorari denied 266 Ill. App. XV, p. 586. Both of these cases involved the interpretation of polices practically identical with the two here under discussion, and each contained a paragraph identical with paragraph VII above quoted, and the conclusion reached was that this paragraph limited the coverage of the policies to injuries by accidents.

In the course of the opinion in the case of Belleville Enameling and Stamping Co. supra, the court said:

"This policy does not in any part of the written contract contain any reference to an injury caused otherwise than by accident. Paragraph seven 'That this agreement shall apply only to such injuries so sustained by reason of accidents occuring during the policy period limited and defined as such in item 2 of said declarations', is, to our minds, of compelling influence in the interpretation of the policy on the question at issue in this case.

In order to give the policy the meaning insisted upon by Appellee, it would in effect require the elimination or rewriting of paragraph seven so as to make a new contract.

'Courts can only examine contracts as they are written and it seems plain to us that the policy covers what it purports to cover that is,—injuries sustained by reason of accidents."

The two policies issued by the New Amsterdam Casualty Company are identical and in order to define the scope of the coverage it is well to notice both of the insuring agreements which provide that the company agrees as follows:

"To indemnify the Assured * * * against any payment under the Compensation Law as specified in the endorsement hereto attached on account of bodily injuries *accidentally* suffered while this policy is in force, * * * by any employee or employes of the assured * * *."

"To indemnify the said Assured against loss from liability imposed by law upon the Assured for damages on account of bodily injuries or death, suffered by said employe or employes of the assured who are not covered by the said Compensation Law."

That this latter paragraph refers to the type of injuries by accident, referred to in the preceding paragraph is emphasized by paragraph "E" of the "Conditions" of the policy which provides:

"Condition E. If the assured carries other insurance, not issued by this company, against loss or expense arising from an *accident* covered by this policy, the assured shall not be entitled to recovery from the company a larger proportion of the entire loss and expense than the amount hereby insured bears to the total amount of his insurance."

Furthermore these policies contain a paragraph designated "Condition A", which is found in similar form in all of the policies involved in this action, and which bears a very important role in defining the coverage contemplated by all of them, viz:

"Condition A. Upon the occurence of an *accident*, the Assured shall give immediate written notice thereof with the fullest information obtainable at the time to the Executive office of the Company * * *. If a claim is made on account of such *accident* the Assured shall give like notice thereof with full particulars."

It must also be noticed that no where in any of these policies is there any specific reference to an injury caused otherwise than by accident.

It would seem, therefore, that sufficient has been said to show that the policies here involved only cover injuries to employees sustained by accidents.

It remains, however, to consider whether an occupational disease, such as radium poisoning is conceded by the stipulation to be, is an injury by *accident* within the meaning of these policies.

As already observed, it is conceded, in view of the specific holding in Liondale Bleach Works vs. Riker, supra and Smith vs. International High Speed Co., supra, that an occupational disease was not compensable under the Workmen's Compensation Act as it stood at the time these policies were in force, for the reason that an occupational disease is not the result of an *accident* within the meaning of said act as it then stood. The plaintiff insists, however, that the word "accident" as used in the Workmen's Compensation Act, and by our Courts in construing and applying that Act, has a narrower meaning than when it is applied to a common law right of action based on negligence. It is claimed that when defining "accident" in compensation cases, our courts uniformly qualify its meaning by adding the words "within the meaning of the Act", or words of like import. Reference is made to Liondale Bleach Works vs. Riker and Smith vs. International High Speed Co., supra, for such qualification and the reason for it.

In the first of the above cited cases the court said inter alia:

"The English Courts seem at last to have settled that where no specific time or occasion can be fixed upon as the time when the alleged accident happened, there is no injury by accident within the meaning of the act. This seems a sensible working rule, especially in view of the provisions of the statute requiring notice in certain cases within fourteen days of the occurence of the injury, —a provision which must point to a specific time."

It will be noted that the reason last given for the rule is not the exclusive reason therefor. But even if it were, it applies with equal force in similarly limiting the coverage afforded by all of the policies involved in this action, because each of the policies contains the paragraph hereinabove quoted, providing in substance that "upon the occurence of an accident", the asured "shall give immediate written notice thereof," to the insurer. Surely, if these policies only cover injuries by accidents, the last mentioned paragraph points to a "specific time or occasion" when the alleged injury must have happened in order to bring it within the coverage provided by these policies.

The plaintiff overlooks the fact that we are not immediately concerned with the word "accident" as applied generally to a cause of action arising out of an occurence due to negligence, but with the specific question of whether the terms of certain contracts of insurance are sufficiently broad to comprehend injury due to an occupational disease, where the coverage is limited to injuries by accident, and where notice of the occurence of an accident is required to be given to the party to be held liable.

Indeed, there would seem to be no good reason why an injury by accident should receive a narrower meaning when appearing in the provisions of the Workmen's Compensation Act, than when appearing as the basis of coverage in an insurance policy where immediate notice of the occurence of the accident is required to be given to the insurer.

At the close of the opinion in the case of Liondale Bleach Works vs. Riker, supra, the Court said:

"There may indeed be compensation awarded for resulting conditions where you can once put your finger on the accident from which they result; but the ground of the action fixed by the statute is the injury by accident, not the results of an indefinite something which may not be an accident."

So here, the ground of an action under these policies must be bodily injury due to an accident, and not the result of an indefinite something which may not be an accident.

It is to be noticed that the plaintiff has expressly stipulated that the injury which forms the basis of the present claim is "an occupational disease resulting from her" (Helen Tuck's) "employment, * * *; which disease has recently become known as radium poisoning."

In the case of Smith vs. International High Speed Co., supra, the claim was based upon an industrial disease arising from breathing fine particles of metallic and mineral substances which were thrown into the air as the result of the plaintiff's work. In the course of the opinion Mr. Justice Bergen said:

(Continued on page 6, col. 2)

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Laws of 1935

(Continued from page 1)

lating to provision that all persons deemed to have been born in lawful wedlock.

CHAPTER 91. (March 25, 1935) State Highway Commission permitted to construct and maintain roads in State parks and on land controlled by Department of Institution and Agencies.

CHAPTER 92. (March 25, 1935) Construction of extension between high speed transit line over Camden-Philadelphia bridge and tracks of P. R. R. and Pennsylvania-Reading Seashore line in Camden authorized to Delaware River Joint Commission.

CHAPTER 93. (March 25, 1935) Season and bag limits on migratory water-fowl conformed to those prescribed by U. S. under Bird Treaty Act.

CHAPTER 94. (March 25, 1935) Validates judicial sale of lands in foreclosure or otherwise where married woman's Christian name designated as fictitious and not in compliance with Sec. 9 of Chancery Act (1 C. S. 413) i. e. name of husband preceded by Mrs.

CHAPTER 95. (March 25, 1935) Limit given defunct trust companies to wind up affairs extended for additional three years.

CHAPTER 96. (March 25, 1935) Limit given defunct banks to wind up affairs extended for additional three years.

CHAPTER 97. (March 25, 1935) Provisions in life insurance policies relating to additional benefits for accidental deaths, clarified.

CHAPTER 98. (July 4, 1935) Municipalities consolidating to assume debts of Municipal Utility plants.

CHAPTER 99. (March 25, 1935) Street railway and traction companies substituting busses for trolleys to pay taxes only applicable to busses.

CHAPTER 100. (March 25, 1935) Veterans may record certificates in lieu of honorable discharges, where unavailable, with County Clerk or Register of deeds.

CHAPTER 101. (March 25, 1935) Reaffirms Home Rule Act 1917 as to tenure provisions for police in cities of less than 12,000 inhabitants (third class).

CHAPTER 102. (March 25, 1935) Municipalities permitted to spread over a period of ten years losses incurred in selling water system owned by municipality at less than cost to water commission.

CHAPTER 103. (March 25, 1935) Forbids, under penalty of being guilty of a misdemeanor, any requirement of an employer that an employee return to the employer (kick back) any part of his salary under threat of discharge.

CHAPTER 104. (March 25, 1935) Forbids the issuance of birth certificates revealing illegitimacy of children, and permits correction of record after marriage of parents.

CHAPTER 105. (March 25, 1935) Birth certificates governing adopted children to be issued to avoid disclosure of adoption proceedings.

CHAPTER 106. (March 25, 1935) A number of former acts relating to the issuance of birth certificates concerning illegitimate children repealed.

CHAPTER 107. (March 25, 1935) Certain municipalities lacking hospital facilities permitted to appropriate money for maintenance of incorporate hospitals in the same or adjoining town, and to assess one-tenth of one per cent. of the assessed valuation of property for such purposes.

CHAPTER 108. (March 25, 1935) Amendment to Old Age Pension and Relief Act, which required that funds of $2,000,000.00 produced in inheritance taxes from a single estate to go to surplus fund for old age relief, now changed to provide that same shall go into the general State fund.

CHAPTER 109. (March 25, 1935) Permits judgments obtained on criminal bond to be compromised under the authority of the governing body of any county and such judgments shall thereupon be cancelled.

(To be continued next week)

Current Decisions

(Continued from page 5)

"I think a disease, such as is described in the complaint, is not the result of an accident, and that a recovery for injuries therefrom is not confined to the Workmen's Compensation Act."

It would seem, therefore, that by admitting that Helen Tuck's injury is the result of an occupational disease, the plaintiff has put the present claim squarely within the foregoing observation of Mr. Justice Bergen, and that the injury complained of is not the result of an accident.

Futhermore the plaintiff's claim is not covered by any of these policies, for the further reason that there is no proof before the court of any personal injury by accident within the specified policy period of any one of the policies here involved.

Each one of these policies limits liability thereunder to *injuries occuring during the policy period.* The stipulation of facts expressly states that Helen Tuck was employed by plaintiff from May 29th, 1917 to August 24th, 1921, in work consisting of mixing radium paint and applying it to watch dials and other articles. During the entire term of her employment Mrs. Tuck was engaged in the work described above, "and while so employed she, in the course of her employment, and while doing said work, became affected with an occupational disease resulting from her employment, wherein she ingested by mouth, a mixture commonly known as 'radium paint'; which disease has recently become known as radium poisoning." Her employment ended on August 24th, 1921, "but the presence of radium in her system was neither a direct nor indirect cause of or factor in the termination of such employment." As hereinbefore mentioned, the complaint filed by Helen Tuck and her husband against the plaintiff in the previous action which was settled, alleged that the radium paint so ingested was of "such an insidious character that it did not produce the consequential injury to the health and body of the plaintiff" (Helen Tuck) "until the month of June, 1928."

There is nothing else before the court to assist in fixing the time of Helen Tuck's injury. If we fix it at the time when the "consequential injury" became apparent in the month of June, 1928, it is long after the coverage period of any of the policies in question. If we attempt to bring it within the time she was employed we have nothing more substantial upon which to rest than the statement in the stipulation that "while so employed she, in the course of her employment, and while doing said work, became affected with an occupational disease * * *" Just when she became affected during the period of her employment, whether during a particular day, month or year, does not appear. Countless assumptions could be made as to when she was harmed, but they would be nothing more substantial than assumptions. Furthermore the settlement of $10,000 evidently covers all damages from the alleged injuries, and there is no factual basis from which to ascertain what proportion of said amount should be borne by each company. The facts stipulated furnish no more basis for saying that the effect of the occupational disease was spread evently over the whole period of her employment, than for saying she was affected only during the first week or year of her employment or the last week or year thereof. There is nothing before the court to settle such questions.

For the reasons hereinbefore stated the first legal question propounded in the stipulated facts, viz, whether any of the policies here involved insured the plaintiff against liability on the compromised claims made against it by Helen Tuck and her husband, must be answered in the negative.

This answer to the first question makes it unnecesary to answer the second question further than to say that no part of the $10,000 settlement should be borne by any of the defendants herein.

The court, therefore, finds in favor of the defendants and against the plaintiff, and a judgment of no cause of action may be accordingly entered.

LANDLORD AND TENANT—Liability for Injuries Occurring Prior to Right of Entry.

N. J. Sup. Ct.

Sadie J. Folley vs. United Bldg. & Loan Association of Hackensack

George Folley vs. United Bldg. & Loan Association of Hackensack

April 6, 1935

On appeal from the District Court for the Third Judicial District of the County of Bergen

Before Justices Lloyd, Case and Donges

For Pltf.-Resp. James A. Major

For Deft.-App. Harry E. Walburg

The opinion of the court was delivered by Justice Case.

Sadie J. Folley sues for personal injuries and her husband, George Folley, for damages *per quod*. Each state of demand alleges that the defendant is the owner of certain dwelling house premises and that on or about February 12, 1934, the parties plaintiff, as tenants of the premises, took up their occupancy by virtue of a certain lease made by the defendant with Mrs. Folley, that the defendant, as landlord, was then under the duty of using due and proper care to keep and maintain the stairways in a safe and proper condition, that defendant failed therein and that consequently, on the said February 12, 1934, Mrs. Folley fell and was injured in using the rear stairway. At the close of plaintiffs' case defendant moved and was denied a nonsuit, to which ruling exception was taken. At the close of the entire case defendant moved for a direction of verdict upon which decision was reserved. The ruling on the last mentioned motion and the judgment itself do not appear in the printed state of the case except as the clerk's docket discloses a judgment for the plaintiff in the sum of $20000. However, the issue disclosed by the briefs is whether the defendant was entitled to succeed as on a motion for judgment, and this, in turn, depends upon whether or not there was evidence to establish Mrs. Folley as an invitee rather than as a trespasser or a licensee.

On January 22, 1934, Mrs. Folley and the defendant entered into a written lease for the premises to begin on February 15, 1934, and to end on May 1, 1935. Mrs. Folley testified that there was an oral undertaking by the defendant that it would make necessary repairs, "would clean and fix everything there was to be done and have the house in good order." Assuming that that oral undertaking made by a representative of the defendant was binding upon the defendant, it nevertheless remains that the Folleys went into the premises on the twelfth of February, three days before the term of the lease began, apparently without any authority and, so far as the record discloses, without any knowledge on the part of the defendant. We are unable to draw from the testimony an invitation to the Folleys to enter the premises before the time fixed in the lease or to deduce a legal obligation upon the defendant to have the repairs made before the beginning of the lease term. Respondent's brief contains the assertion that "There was sufficient evidence from which a jury could infer that Mrs. Folley was an invitee," but we are cited to no such testimony. The burden of proof is, of course, upon the plaintiffs, and as there is no proof that the plaintiffs were on the premises on the twelfth day of February by any invitation, express or implied, of the defendant, it follows that they were either trespassers or licensees. The general rule is that the only duty of a landowner to a licensee or trespasser is to refrain from acts willfully injurious. *Heckenstein vs. Great Atlantic & Pacific Tea Company*, 91 N. J. L. 145. There is neither proof nor suggestion that the defendant was guilty of willful or wanton injury. Defendant's motion should, therefore, have been granted as to Mrs. Folley. Unless the wife can recover for personal injuries suffered by her, the husband in such an action is not entitled to consequental damages. *Rossman vs. Nordon*, 112 N. J. L. 261. Therefore the motion as to the husband should also have been granted.

Judgment below will be reversed.

PLEADING AND PRACTICE—Garnishment Proceedings—Adverse Claimants.

N. J. Sup. Ct.

Raymond Chasan vs. The Court of Common Pleas in and for the County of Hudson, Gustave Bach, Clerk of the County of Hudson, Elnora Smith and Richard J. Norrell

On Certiorari.

April 6, 1935

Before Chief Justice Brogan and Justices Parker and Bodine

For the Pros. Richard Doherty

For the Resp. (Richard J. Norrell)—Robert S. Hartgrove

Chief Justice Brogan.

The writ brings up for review an order of the Court of Common Pleas of Hudson County in a garnishment proceeding. The situation may be stated as follows: Raymond Chasan, an attorney at law of New Jersey, had acted as solicitor in a Chancery proceeding for [illegible] Elnora Smith, as a result of which it was decreed that Miss Smith was entitled to $3,493.87. It appears that there was no dispute that there was an agreement between him and his client that he should receive one-third of the sum recovered as and for compensation for his legal services. There being due him as solicitor, he received $1,570.22 on account of the amount due him under the decree and he advised his client of the sum so received and further that he was retaining therefrom the amount of his entire fee, namely $1,[illegible] that he held the balance of the fund subject to her order. Thereupon Elnora Smith, withdrew the sum of $100 from the amount so held by her attorney for her. Thereafter she confessed judgment in favor of one J. Norrell for the amount of a certain bill for the burial of her [illegible] totaled over $600; execution was issued for the amount of the said judgment and a copy of the writ was served on said Chasan, from which the officer demanded the full amount of the judgment, which he refused. Thereupon an affidavit was made by a judge of the Common Pleas Court, who allowed a rule to show cause as to why Chasan should not pay this judgment in full out of the fund he had recovered for Miss Smith.

On the return of the rule to show cause no witnesses were sworn, but affidavits received nor proofs of any kind offered on the matter before the court, having heard the matter informally, and the representatives of the parties, signed an order directing that all the moneys in the hands of Chasan were held for the benefit of Elnora Smith except the sum of $525.49 upon which Chasan was allowed a lien for the services rendered his client in the Court of Chancery, and further ordering Chasan to pay over to the attorney of Norrell a sum sufficient to satisfy the judgment. The order is brought up by writ of certiorari for review and is challenged for reasons for reversal which it is unnecessary to state.

The order will be set aside.

(Continued on page 8, col. 3)

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...iction Over ...Hudson River

(Continued from page 3)

...are the observance of all the ...and regulations for the pro... of passengers and property, ...l fit governmental control de... to secure the interests of trade ...mmerce in said port of New ... and preserve thereupon the ...peace." (page 299-300).

...he later New York case of *Fer...v. Ross*, 126 New York, 459, ... the Court of Appeals upheld ...ower of the New York courts ...force a penalty for the deposit ...dgings in the Hudson River ...ly of the middle line thereof ...olation of a New York Act ...prevent the deposit of carrion, ...or dead animals in the North ...st Rivers or in the Bay of New ... or Raritan Bay, within the ...diction of the State of New ..." upon the ground that such ...had as its object the protection ...ommerce and navigation and ...a proper exercise of the extra... jurisdiction conferred up... New York by the treaty. The ..., moreover, affirmed that "the ...ose of vesting exclusive juris... on over these waters in the ...e of New York was to promote ... interests of commerce and navi..., which would, as supposed, ...best subserved by giving to this ...e the exclusive control and regu... of the waters of the bay and ...or of New York." (Page 463). *...Carlin v. New York, New Haven ... Hartford Railroad Company*, ... Appellate Division (N. Y.) 870, ...), where the cause of action ... under a New York wrongful ...h statute and it was proved that ...tiff's intestate was killed in a ... float accident in the Hudson ...r westerly of midstream, the ...ellate Division, Second Depart..., held that New York's extra... jurisdiction under the ...ty included such a cause of ac... This case represents the farth... point to which the New York ...rts have gone in construing the ...ent of such extraterritorial juris...tion. It is to be noted that the ...ase of action did not arise under ...special statute expressly enacted ... the control and regulation of ...mmerce upon port waters and ex...ssly provided to apply to the ...ters "within the jurisdiction" of ... State of New York, as was the ...e in the earlier Court of Appeals ...e of *Ferguson v. Ross*, supra. As ... appeal was taken, the issues in...ved were not passed upon by the ...urt of Appeals.

...n addition to these cases arising ... the State courts, there have also ...n a number of decisions in the ...deral courts bearing on the con...uction of the treaty: *Hall v. De... Manufacturing Company*, 14 Fed. ..., affirmed 108 U. S. 401, (1882) ...terruling The Schooner Eaton, 9 ...a. 289, (1878); The Sarah E. Ken...ly, 25 Fed. 509, (1885); The Ros...ry, 23 Fed. 2nd, 1031 reversed 26 ...d. 2nd. 354, certiorari denied 278 ... S. 619, (1927) overruling the ...rma, 32 Fed. 411, (1887); These ...es confirmed that the boundary ...e between the States fixed by the ...aty of 1834, was the middle line ... the river and bay; but, inasmuch ... the question involved in these ...es was the territorial limits of ...isdiction of the Federal district ...urts of New York and New Jersey ...ich, by statutory demotion, co...ided with state boundary lines, ... courts were not called upon to ...sider precisely the extent and ...ture of the extraterritorial juris...tion conferred upon New York ... the treaty, except to point out that ...h jurisdiction was a police juris...tion only, which did not alter or ...any way controvert the territorial ...ndary limits of the States pre...ed in Article First.

...om the foregoing summary of ...ecisions of the State and Fed... courts during the hundred years ... the making of the treaty it is ...ent that the question which ... Appellate Division was called upon to decide in *Clarke v. Ackerman* was, in certain respects, a novel one. Not only is the George Washington Bridge, upon which the collision occurred, a type of structure which the framers of the treaty could scarcely have contemplated in the provision reserving to New Jersey jurisdiction over "wharves, docks and improvements * * * on the shore" of New Jersey, but an automobile accident on an interstate highway, over the river, had no direct connection with trade and commerce upon port waters.

In the *Carlin Case*, supra, the New York courts had assumed jurisdiction over a cause of action in favor of the next of kin of one negligently killed by vessels navigated in the waters over which New York, under the treaty, had extraterritorial jurisdiction. If New York's jurisdiction extended to such a case, would it extend also to a cause of action arising out of a motor collision upon a bridge over such waters?

The lower court, in *Clarke v. Ackerman*, upheld the validity of service of the summons upon the non-resident defendant by service on the Secretary of State of New York, pursuant to the Vehicle and Traffic Law upon the ground that under the treaty of 1834, jurisdiction of the George Washington Bridge westerly of the middle line of the river resided in New York. Indeed, the language of the lower court might be interpreted to go even further and imply a jurisdiction of the State of New York over the entire bridge.

Such a construction of the treaty was obviously a matter of vital concern to the two States and to the Port of New York Authority. The Port of New York Authority was created by amendment of the Treaty of 1834 between the States, in 1921, to undertake the construction and operation of projects in the Port of New York district such as interstate bridges and tunnels which required the cooperation of both States. It was a matter of no little importance to the Port of New York Authority to know whether such facilities as the Holland Tunnel and the George Washington Bridge, both of which it owns and operates, and the proposed Midtown Hudson Tunnel were within the exclusive jurisdiction of New York or whether jurisdiction of the two States over such facilities extended exclusively to the middle line of the river. The Attorney-General of New York, the Attorney-General of New Jersey and the Port of New York Authority concurred in the opinion that the extraterritorial jurisdiction granted to New York under Article Third of the Treaty, did not extend to the George Washington Bridge beyond a point over the middle line of the river and, therefore, appearing as *amici curiæ* on the appeal from the order of the Special Term to the Appellate Division, First Department, filed a brief in support of their position. The Attorney-General of New York, in thus joining with the other *amici* in a position which was adverse to the claims of New York to jurisdiction over that portion of the bridge westerly of the middle line of the river, revealed a sense of justice and fair dealing toward a sister state which is worthy of no small praise. A similar attitude, it should be observed, had also been shown by the New York courts, particularly in the leading case of *People v. Central Railroad Company of New Jersey*, supra, in recognizing New Jersey's rights under the treaty.

The Appellate Division, in the opinion by Justice Townley, handed down on March 9, 1935, above referred to, reversed the decision of the Special Term, on the ground that the jurisdiction of the State of New York did not extend to the George Washington Bridge beyond a point of the middle line of the river. With respect to the extraterritorial jurisdiction given to New York under the treaty the court stated:

"The 'exclusive jurisdiction' referred to in Article Third has been construed to refer to police jurisdiction over offenses happening anywhere in the river. There was never any intention on the part of New Jersey to give up its prerogatives of sovereignty or any of the territory granted it by the treaty."

and concluded, after referring to *People v. Central Railroad Company of New Jersey*, 42 N. Y. 283, *Ferguson v. Ross*, 126 N. Y. 259 and *Central Railroad Company v. Jersey City*, 209 U. S. 473, "that Article Third has been so limited by judicial interpretation as to make the present claim of jurisdiction untenable."

The court further pointed out that, under the second exception of Article Third, reserving to New Jersey exclusive jurisdiction over the "wharves, docks and improvements" on the New Jersey shore, the George Washington Bridge could be considered such an improvement:

"It is possible to consider this bridge as an 'improvement' made to or on the shore of New Jersey under Article Third, subdivision 2, of the Treaty. On the New Jersey shore the bridge is supported by one great pier placed upon the bed of the river east of the low water mark. The floor of the bridge extending out to the center may be analogized to a wharf or pier. If such a comparison is just then under the specific exceptions of the treaty, jurisdiction is retained by New Jersey to the center of the river."

The court also referred to two statutes (Chapter 140, Laws of New Jersey, 1932, and Chapter 251, Laws of New York, 1934) establishing rules and regulations for the control of traffic on the interstate bridges and tunnels operated by The Port of New York Authority and prescribing proceedings and penalties for the violations. The court pointed out that the provisions of these acts indicated that ordinary territorial limitations of jurisdiction were to be observed in relation to offenses on any vehicular crossings and that such provisions, therefore, constituted a practical legislative construction of the treaty.

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*Mr. Wilton D. Cole is a member of the New York Bar. He received the degree of Bachelor of Arts from Harvard College in 1923 and after a year in Harvard Law School went to Oxford University with a Rhodes' scholarship, where he received the degree of Bachelor of Arts in Jurisprudence in 1926. In 1929 he obtained the degree of Bachelor of Laws from Fordham Law School.

Abstracts of Public Utility Decisions

In the matter of the application of Comfort Bus Line for rehearing on application of Charles Logatto, trading as Olympic Bus Line, for approval of modification of restrictions imposed by the board in its decision of December 7, 1932 on operation of ten auto buses on A route between and including the Erie Railroad Station, East Rutherford, and Hoover Avenue Terminal, Passaic, N. J. March 20, 1935.

Appearances—Riegner and Levy, by Edward A. Levy, for Comfort Bus Line.

Charles S. Straw for Public Service Coord. Transport.

John C. Barbour and Nicholas Marsh for Olympic Bus Line.

Thomas E. Duffy for Consolidated Bus Line.

Morris E. Burlson for Hasbrouck Heights Community Bus Line.

Application denied finding that there is no public necessity for the operation of seven buses between East Rutherford and Passaic, Board's decision the operator has operated but two buses, and will and hereby and modifies its decision of May 2, 1931 permitting the continued operation of two buses under restrictions set forth in the Board's decision of May 2nd, 1934.

In the matter of the application of the Central Railroad Company of New Jersey, for permission to discontinue maintaining the part time agent at Mauricetown Station and continue same as a Non-Agency Station. March 20, 1935.

Appearances—H. B. Thomas for the Petitioner.

Application granted and effective May 1, 1935.

In the matter of the application of the Pennsylvania Railroad Company for permission to discontinue maintaining an agent at Evenel Station and continue same as a Non-Agency Station in Woodbridge Township, Middlesex County, New Jersey. March 20, 1935.

Appearances—Theodore Strong, Jr., for the Petitioner.

Parker E. Nielsen for the Township of Woodbridge.

Robert I. MacBride and W. J. Raleigh for Objectors.

Application denied.

In the matter of the application of the Lehigh Valley Railroad Company for permission to reduce the hours of the agent at Roselle Park, Union County, New Jersey. March 20, 1935.

Appearances—P. G. Martin, Jr. for the Petitioner.

Application granted.

In the matter of the application of the Central Railroad Company of New Jersey for permission to discontinue maintaining an agent at Woodruffs and continue same as a Non-Agency Station. March 20, 1935.

Appearances—H. B. Thomas for the Petitioner.

Application denied.

In the matter of the application of New Jersey Bell Telephone Company for the approval of an ordinance of the Township of Wyckoff, Bergen County, New Jersey. March 20, 1935.

Application approved.

In the matter of the application of the Pennsylvania Reading Seashore Lines for the authority to acquire and merge the franchises and property of the Wildwood and Delaware Bay Short Line Railroad Company. March 20, 1935.

Application granted and acquisition approved.

In the matter of the application of New Jersey Bell Telephone Company for approval of an ordinance of the Borough of Roseland, Essex County, New Jersey. March 20, 1935.

Application approved.

In the matter of the application of New Jersey Bell Telephone Company for approval of an ordinance of the Borough of Wanaque, Passaic County, New Jersey. March 20, 1935.

Application approved.

In the matter of the application of the Central Railroad Company of New Jersey for permission to discontinue maintaining a part time agency at Rosenhayn and continue same as a non-agency station. March 20, 1935.

Appearance—H. B. Thomas for the Petitioner.

Application granted.

In the matter of the application of the Lehigh Valley Railroad Company for permission to discontinue maintaining an agent at Alpha Station and continue same as a prepaid station under the jurisdiction of the agent at Phillipsburg, Warren County, New Jersey. March 20, 1935.

Appearance—P. G. Martin, Jr. for the Petitioner.

Application denied.

In the matter of the application of B-G Bus Company, Inc., for approval of the issuance of ten shares of no par value capital stock. March 20, 1935.

Appearance—Gerschon Levine for the Petitioner.

Application denied.

In the matter of the application of B. & M. Bus Corporation for approval of the issuance of ten shares of no par value common stock. March 20, 1935.

Appearance—Jacob Siegal for the Petitioner.

Application approved.

In the matter of the application of the Fleet Bus Company, Inc., for approval of the transfer to it of municipal consent from the G. S. Bus Corporation to operate one auto bus on the Broadway Route, in the City of Bayonne, New Jersey. March 20, 1935.

Application for approval for transfer approved.

In the matter of the application of Fleet Bus Company, Inc., for approval of the issuance of 10 shares of no par value capital stock. March 20, 1935.

Appearance—Samuel Aiban, for the Petitioner.

Application approved.

In the matter of the application of the Public Service Coordinated Transport for approval of municipal consent for the extension of Ampere Bus Route No. 2 (Prospect and Dodd Streets Service) to Brighton Avenue and Sorrel Terrace, East Orange, N. J., route as extended to operate between and including Newark and East Orange, N. J. March 20, 1935.

Appearance—Charles S. Straw for Public Service Coordinated Transport.

Application approved with conditions annexed.

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Com Pleas (Weekly call)	575

Hon. Joseph L. Smith will hear Circuit Court Motions Friday, April 26th, at the Court House, Newark, N. J.

Hon. Joseph L. Smith is now sitting in Bergen County and Hon. Newton H. Porter in Sussex County.

HUDSON COUNTY

Supreme (Weekly call)	526
Circuit (Weekly call)	350
Com Pleas (Weekly call)	1000

UNION COUNTY

Sup & Cir (Weekly call)	1155
Com Pleas (Weekly call)	388

Hon. Frank L. Cleary will hear Circuit Court motions on Friday, April 26th.

BERGEN COUNTY

Sup & Cir (Day call)	568
Com Pleas (Weekly call)	300

PASSAIC COUNTY

Sup & Cir (Weekly call)	810
Com Pleas (Day call)	57

There will be trials of cases until April 23rd, which is the opening of the new term.

CAMDEN COUNTY

Sup & Cir (Weekly call)	25

Hon. V. Claude Palmer will hear motions every Friday, except holidays, during the April Term.

MERCER COUNTY

Sup & Cir (Weekly call)	101

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Current Decisions

(Continued from page 6)

reason that the court, in making the order in question, exceeded its jurisdiction. The theory upon which the order was made was that the court determined that Chasan was a mere garnishee which, in the record before us, depositions having been taken under the writ, he denies, except as to the sum of $311.83. The Execution statute (Cum. Suppl. 1911-1924, sec. 71-66, p. 1207) provides, under circumstances like these, that the court may, on the return of a rule to show cause, order a garnishee to pay the debt, providing he admits it. But here, Chasan, the solicitor, does not admit that he holds sufficient moneys of the judgment debtor to satisfy the debt. He contends that he retains only $311.83 of Miss Smith's money and that the balance belongs to him for services. Whether he is within his rights in so doing is another matter, not before us. The court below had no power to determine, in a proceeding of this kind, the rights of the adverse claimants to the fund. No suit therefore was pending and the rule to show cause served on the attorney was not process sufficient to give the court jurisdiction over the subject matter of the controversy. National Bank of N. J. v. Ainscow, etc. 12 N. J. Misc. 362; First Mechanics Natl. Bank of Trenton, etc. v. N. J. Brick & Supply Co., 112 N. J. L. 218; The Barrett Co. v. United Bldg. Construction Co., 5 N. J. Misc. 87; N. Drake, Inc. v. Daniel J. Donovan, et al., 8 N. J. Misc. 869.

The order will therefore be set aside with costs.

SIDEWALKS—Nuisance.

N. J. Sup. Ct.

Sarah Blackman vs. Janssen Dairy Corp., a corporation

April 6, 1935

On appeal from the District Court of the City of Bayonne

Before Justices Lloyd, Case and Donges

For Plff.-Resp. Fred Feinberg, Max Feinberg

For Deft.-App. Charles Stuckdell Gray, Everitt Rhinehart

The opinion of the court was delivered by Justice Case.

Plaintiff sued for personal injuries suffered from a fall said to have been caused by a condition of nuisance in the sidewalk at the front of the defendant's premises. The judge, sitting without a jury, gave judgment to the plaintiff, and defendant appeals. The specification of determinations with which the appellant is dissatisfied includes the court's refusal to nonsuit and to grant defendant's motion for a judgment in its favor.

The brief state of the case settled by the court does not enable us to distinguish with certainty between the recital of the evidence produced and the statement of the court's findings thereon. Our understanding, however, is that the court returns to us as the proofs in the case "that the defendant was, on November 3, 1932, the owner, in complete possession, of the premises at 261 Ocean Avenue, Jersey City, and had acquired title and possession thereto on October 1, 1930; that the condition complained of existed on the sidewalk at the time when the property was acquired by defendant; that the sidewalk was cement and near the curb line there was a round opening in the cement about twelve inches in diameter and the dirt therein was at least one inch below the level of the cement"; and we understand further that upon those proofs the court based its factual findings as follows: "I found as a factual question that this condition constituted a nuisance, and that it was not due to wear or tear, or action of the elements; that the defendant maintained and adopted this condition; that the plaintiff while walking on the sidewalk fell and injured herself by reason of this condition." The foregoing is the sum total of the evidence and also of the findings thereon except that an award was given the plaintiff and against the defendant for $150.00. It is further certified to us that there was a motion by defendant for nonsuit, followed by a refusal and an exception thereon; and that the defendant rested without proof, moved for a judgment in its favor as a matter of law upon specified grounds, was refused and took an exception.

The respondent undertakes to support the judgment upon the theory that the condition of the sidewalk constituted a nuisance, that the nuisance was due to the construction of the sidewalk and that the defendant maintained the nuisance and is therefore liable for the plaintiff's injuries which were caused thereby, citing *Braclow vs. Klein*, 100 N. J. L. 156, *Monzolino vs. Grossman*, 111 N. J. L. 325, and *Durant vs. Palmer*, 29 N. J. L. 544. We think that the proved facts do not bring the case within the purview of any of those decisions. They are not comparable to those of Durant vs. Palmer, wherein there was an unprotected areaway leading to the house basement. The alleged nuisance in the instant case is neither found nor proved to have been a matter of construction and therefore is essentially different from the condition existing in Braclow vs. Klein. In Monzolino vs. Grossman the source of the trouble was an awning hung from an adjoining building. We think that the instant case falls rather within the classification of *Ford vs. Jersey Central Power and Light Company*, 111 N. J. L. 112, and *Saturese vs. Fleckenstein*, 111 N. J. L. 574 aff. 114 N. J. L. 275. It is clear from the proofs that the condition complained of was not created by the defendant but existed prior to the latter's acquisition of the property. The finding by the court below that the defendant maintained and adopted the condition is a conclusion that seems to have no support in the proofs. The round opening, about twelve inches in diameter, in the cement suggests that a pole or a tree may originally have occupied that space, but whether so or not and, if so, at whose instance it was put there or removed does not appear. If the defect was breakage and dilapidation in the cement, and the charge against the defendant is failure to repair, that sets up no case for the plaintiff. *Rapp vs. Burgess*, 70 N. J. L. 7. All that we have is that there was the hole in the cement and a slight depression of an inch in the earth fill, a condition that existed at the time of the acquisition of title by the defendant and still remains. That, under the cases, is not sufficient to visit liability upon the defendant. The refusal of the motions for nonsuit and direction was error.

Respondent's brief mentions a photograph that was in evidence, but the photograph is not before us and is not recited in the settlement of facts that comes to us in the printed case.

The judgment below will be reversed.

INSTRUCTIONS—Duty to Charge Jurties—Examination of.

N. J. Sup. Ct

William Kruschka, by Herbert P. Kruschka, his next friend, Herbert P. Kruschka, individually, and Edith H. Kruschka, v. Mae Konvitz

April 8, 1935

On Appeal

For defendant-appellant, Edward A. Markley

For plaintiffs-respondents, William J. O'Hagan

Before the Chief Justice, Justices Parker and Bodine

Per Curiam:

The infant plaintiff was grievously injured by reason of a collision between the car his father was driving and that driven by the defendant. The action was tried before the court and a jury.

The court, at no time, defined negligence, proximate cause, contributory negligence, or stated the true rule of damages applicable to an action of this kind. Such legal princples were obviously an essential part of the court's charge, if the jury were to find the facts within the bounds of the controlling legal principles. Counsel was certainly entitled to the expectation that the court would observe this fundamental duty. At the close of the charge, counsel directed the court's attention to the omission but the court instead of them requesting written requests, if ignorant of the legal principles applicable, expressed the opinion that the matters suggested were well covered. We cannot find this to be so. Such action was prejudicial error. Hartwyk v. Shea, 18 Oct. Term, 1934, decided January 21, 1935.

Since this case must be retried, it might be well for counsel to note that an inquiry addressed to jurors as to their acquaintance with counsel employed in the case finds no sanction in our law, since mere acquaintance would not tend to show a lack of impartiality as between the parties to this suit. Boyd v. Husted, 3 Misc. 225.

The judgment is reversed.

CHANCERY CALENDAR

The Chancellor will hear motions at Trenton, every Tuesday.

A Vice Chancellor sits at Union County Court House, at Elizabeth, every Monday morning for the purpose of hearing Chancery motions.

V. C. Berry will hear motions at Newark on Tuesday, May 7.

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V. C. Lewis will hear motions at Paterson on Monday, April 29th.

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V. C. Stein will hear motions at Newark on Tuesday, April 30th.

ADVISORY MASTERS

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A. M. Stanton will hear motions at Jersey City on Friday, April 26th.

A. M. Trapp will hear motions at the Court House in Somerville on Monday, April 29th.

A. M. Van Winkle will hear motions at Jersey City on Saturday, April 20th.

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